

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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Washington, DC 20001-2714

DISTRICT OF COLUMBIA
FIRE AND EMERGENCY MEDICAL
SERVICES (FEMS)

Petitioner,

v.

JEFF KRAMER

Respondent

Case No.: FE-I-08-W100488

FINAL ORDER

I. Introduction

In the summer of 2008, Respondent Jeff Kramer constructed a stone fireplace and made other improvements in the rear yard of his residence located at 6157 30th Street, N.W. (the “Property”). As a result of a complaint from a neighbor who lives in an adjacent property about smoke from the fireplace, Inspector Cyntrill Campbell conducted an inspection on September 9, 2009.

Following the inspection, Inspector Campbell issued a Notice of Infraction, which alleged three violations of the District of Columbia Fire Prevention Code: (1) a violation of 12 H DCMR F-107.1 for failing to obtain an installation permit; (2) a violation of 12H DCMR 107.1 for failure to maintain operational permits; and (3) a violation of 12H DCMR F110.1 for failure to remedy hazardous conditions liable to cause or contribute to the spread of fire. In the Notice of Infraction, the Government seeks a fine of \$2,000, for each violation for a total of \$6,000.

Mr. Kramer denied the violations, and a hearing was set for February 6, 2009. At the hearing held on that date, Sergeant Mark Davis appeared for the Government, and Inspector Campbell testified for the Government. Gary Thompson, Esq. represented Mr. Kramer. Mr. Kramer and his wife Mrs. Caroline Kramer testified for Respondent.¹

Based upon the testimony of the witnesses, my assessment of their credibility, the documentary evidence received, and the entire record, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

On September 9, 2008, Inspector Campbell went to the Property as a result of a complaint from a neighbor that smoke from Mr. Kramer's fireplace was getting into her house. No one was home at the Mr. Kramer's house at the time, so Inspector Campbell went next door to the home of the neighbor who made the complaint. The neighbor admitted her, and from the neighbor's property, Inspector Campbell was able to observe and photograph the rear of the fireplace. (PX 100)

The fireplace is approximately 11 feet in height to the top of the chimney. Photographs taken by the Inspector show that there is a circular opening in the back of the fireplace, which is visible through slats of a wooden fence between the properties. PX 100. The opening is approximately one foot from the fence and is approximately 3 or 4 feet above the ground. RX 213.

The Inspector indicated that she believed that the proximity of the opening to the fence

¹ The following Exhibits were admitted into evidence: Petitioner's Exhibits "PX" 101 and 102. Respondent's Exhibits "RX" 200, 201, 203-205, 207-213

posed a fire hazard because of smoke and sparks that might be emitted from the opening when the fireplace was lit. Mr. Kramer testified that the opening was an air intake. In light of the location of the opening and the fact that the fireplace has a large chimney, designed to draw and emit smoke, I will credit the testimony that the opening is an air intake.

On the day of the inspection, Inspector Campbell mailed both the Notice of Infraction ² and a Notice of Violation to Mr. Kramer in the same envelop, which was received by him on September 15, 2008. The Notice of Violation referenced the same three violations as in the Notice of Infraction and indicated that the violations must be abated by the follow-up abatement date of September 23, 2009. RX 207. ³ Inspector Campbell returned to re-inspect on September 23, 2008. As Mr. Kramer was not home, she again observed the Property from the neighbor's yard and

² The copy of the Notice of Infraction sent to Mr. Kramer indicated that instructions for answering the Notice of Infraction appeared on the back of the form. The back of the form they received was blank. Moreover, on the original of the form in the file, the back contains a certificate of service, but no instructions on filing an answer. Revisions of the form are obviously needed to remedy these problems.

³ The Notice of Violation is a warning that fines or other sanctions will be sought unless violations are corrected in a specified period. It is thus in effect a notice that penalties will not be sought if the violations are abated before the re-inspection date specified. On the Notice of Violation form, the following appears.

Failure to remedy said violations will subject you to the penalties prescribed by section F-112.3 of the District of Columbia Fire Prevention Code, ...

FEMS has authority to issue a Notice of Infraction seeking fines for a violation without first issuing a Notice of Violation. 12 H DCMR F-112.1.4 However, when FEMS issues a Notice of Violation, it must follow its own practices and procedures and not issue a Notice of Infraction seeking fines until after the property is re-inspected. *FEMS v. Central Parking Systems of Virginia* 2007 D.C. Off Adj. Hear. Lexis 15 at 7, April 25, 2007.

That was not done in this case as both the Notice of Infraction seeking fines and the Notice of Violation were issued at the same time. Since the violations in this case are being vacated for other reasons, it is not necessary to reach the issue of whether the issuance of the Notice of Infraction before the re-inspection date provided for in the Notice of Violation would also warrant dismissal of the Notice of Infraction.

found that no modification had been made in the fireplace.

Mr. Kramer had not obtained a building permit from the Department of Consumer and Regulatory Affairs (DCRA) for the construction of the fireplace and other improvements on his Property. Shortly after receiving the Notice of Infraction on September 15, 2008, he applied for a building permit. The building permit was issued on September 25, 2008. The scope of work listed in the description of work section of the building permit includes removing the existing wood deck, constructing a stone patio, and repairing a porch and roof. Although construction of the fireplace is not listed in the description of work on the permit, drawings of the fireplace appear clearly on the plans approved by DCRA for the project. RX 213. DCRA has not Notice of Infraction for undertaking this project without a building permit.

After receiving the Notice of Infraction, Mr. Kramer ordered and installed a copper chimney cap with a device called a spark arrester which is approximately 41” in height. He also removed holly trees and other vegetation in the vicinity of the fireplace. RX 208. These measures were not requested by the fire department to reduce the risk of fire. However, at the request of DCRA, Mr. Kramer provided information about the spark arrester before DCRA issued the building permit. RX 200.

Since the fireplace was built, it has been lit only once since to test the flue. Respondent has not used the fireplace again because of the Notice of Infraction issued in this pending matter.

III. Conclusions of Law

Mr. Kramer was charged with two violations of 12H DCMR F-107.1, a provision in the District of Columbia Fire Prevention Code. This provision, which is more than ten pages in length, provides for two types of permits: an “installation permit” and an “operational permit.” The Government has alleged that 12 H DCMR F-107.1 requires that Mr. Kramer obtain both types of permits to build and use his fireplace. We will discuss each of these permits in turn

A. Installation Permit

An installation permit is required “to install or modify systems and equipment for which a permit is required by Section 107.11.” That provision in turn requires an installation permit in certain specified situations, listed in the regulation. They are the repair or installation of: (1) compressed gas systems; (2) pipelines, tank vehicles and other facilities used for production and storage of flammable liquid; (3) storage facilities for hazardous materials that exceed specified quantities; (4) LP-gas systems; and (5) facilities used for spraying and dipping operations.

None of the specific installations listed in the regulation are remotely similar to a fireplace. Thus, the cited regulation clearly does not require that a homeowner obtain an installation permit from the fire department to build a fireplace.

The Inspector stated that she issued the Notice of Infraction charging the cited regulation because Respondent lacked a building permit. The cited regulation does not address building permits and cannot be relied on to charge a violation for failing to have a building permit. The regulations which govern when a building permit must be obtained appear in the building code, enforced by DCRA. *See* 12A DCMR 105A. Consequently, this violation will be dismissed.

B. Operational Permit

Under 12H DCMR F-107.10, a code official is authorized to issue operational permits for operations set forth in Sections 107.10.1 through 107.10.43. Those sections cover a wide range of activities that include, for example, operation of aviation facilities and dry cleaning plants, and use of explosives. The only provision in the referenced sections possibly relevant to this case is the following:

Open burning. An operational permit is required for the kindling or maintaining of an open fire or a fire on any public street, alley, road, or public or private ground. Instruction and stipulations of the permit shall be adhered to. 12 H DCMR F-107.10.28.

As Respondent's backyard is not a public street, alley, road or public ground, the regulation is applicable only if a fire in a fireplace in a private yard is considered to be fire on "private ground." The use of the term "ground" in the regulation is significant, as it suggest that the regulation applies only to fires that are directly on the ground. Fireplaces are structures designed to contain a fire and keep it off the ground, thereby lessening the danger that the fire will spread. Fires in fireplaces are there not on the ground as that term is used in the regulation. Moreover, if this regulation is construed to require a permit from the fire department to use a backyard fireplace, it could also be construed to require a permit for operating a backyard barbeque. Such a far-ranging interpretation of the regulation is simply not reasonable. Consequently, the violation charged for lack of an operational permit will also be dismissed.

C. Failure to Remedy Hazardous Condition

The Government also charged Respondent with violating 12H DCMR F110.1 by failing to remedy hazardous conditions liable to cause or contribute to the spread of fire. At the hearing, the Inspector testified that this charge was based on her belief that the proximity of the opening in the

back of the fireplace to the fence posed a fire hazard because of smoke and sparks that might be emitted from the opening. As I have found that the opening was an air intake, the Government has not established that the proximity of the opening to the fence is a hazardous condition likely to cause or contribute to the spread of the fire.

At the hearing, the Government presented no evidence concerning any hazards that might be posed the lack of a spark arrester or the proximity of vegetation. There is consequently no basis for concluding that these conditions posed a hazard likely to cause or contribute to the spread of fire.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is, hereby, this 19th day of March, 2009:

ORDERED, that Notice of Infraction No.W100488 is **DISMISSED**; and it is further

ORDERED, that appeal rights of any person aggrieved by this Order are set forth below

/s/
Mary Masulla
Administrative Law Judge